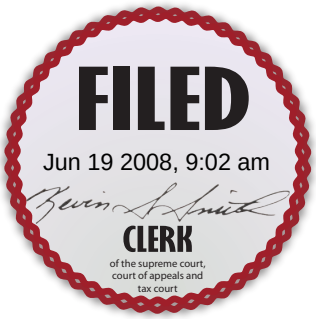

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL W. MASON and VICKY L. MASON, Appellants-Defendants, vs. LANDES CUP INVESTMENTS, INC., Appellee-Plaintiff.	))))))))))	No. 49A04-0710-CV-584

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary L. Miller, Judge
Cause No. 49D05-0607-PL-28828

June 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Michael and Vicky Mason appeal the trial court's award of prejudgment possession of real property to Landes Cup Investments, Inc. We affirm.

Facts and Procedural History

The Masons owned and leased commercial property until 2005, when Landes Cup purchased it at a tax sale. The parties entered a contract, whereby the Masons would remain in possession and purchase the property for payments over time. In the event of default, Landes Cup could pursue any and all remedies, including foreclosure. When the Masons failed to pay anything after the one dollar paid upon execution of the contract, Landes Cup sued, seeking sale of the property to satisfy its money damages.

Landes Cup filed an affidavit of the company's president, stating that Landes Cup, not the Masons, was entitled to possession. After a hearing, the trial court found that the Masons had failed to establish any legal right to remain in possession. Accordingly, it awarded prejudgment possession to the owner, Landes Cup, during the pendency of the lawsuit. The Masons bring this interlocutory appeal.

Discussion and Decision

I. Adequacy of the Complaint

The Masons argue that the statute allows prejudgment possession only where the plaintiff seeks to take actual possession of the real estate, as opposed to requesting an order for the property to be sold. The interpretation of a statute is a question of law which we review de novo. Lake County Auditor v. Burks, 802 N.E.2d 896, 898 (Ind. 2004). When a statute is clear and unambiguous, we take words and phrases in their plain, ordinary, and usual sense. City of Carmel v. Steele, 865 N.E.2d 612, 618 (Ind. 2007).

Indiana Code Chapter 32-30-3 addresses prejudgment possession of real estate. Specifically, Indiana Code Section 32-30-3-1(a) makes this remedy available for actions in ejectment or for the recovery of possession of real estate.

In its complaint, Landes Cup sought "an in rem judgment against the Property . . .; that the Contract be foreclosed against the Property . . .; that the Property be ordered sold . . . to satisfy the judgment . . .; and for all other just and proper relief." Appendix at 8. Landes Cup's president affirmed that it was entitled to possession. During the course of the hearing, the judge and each parties' attorney referred to the matter as an eviction.

First, "ejectment" is defined as the "ejection of an owner or occupier from property." Black's Law Dictionary 556 (8th ed. 2004). By requesting sale of the property in its complaint, Landes Cup clearly sought to remove the Masons from the property. This supports the conclusion that Landes Cup's complaint entitled it to seek prejudgment possession. Second, by addressing disjunctively actions in ejectment or for the recovery of possession, the General Assembly's plain intent was that the plaintiff need not pursue actual possession as the ultimate remedy in order to seek possession during the lawsuit.

Furthermore, while forfeitures are generally disfavored by the law, see Skendzel v. Marshall, 261 Ind. 226, 301 N.E.2d 641, 644 (1973),[1] Landes Cup should not be penalized for pursuing foreclosure.[2] The remedies sought simply reflect the reality that it desired only the benefit of its bargain, rather than the opportunity to manage this commercial property.

[1] See also Dempsey v. Carter, 797 N.E.2d 268, 275-77 (Ind. Ct. App. 2003), trans. denied; and Johnson v. Rutoskey, 472 N.E.2d 620, 625 (Ind. Ct. App. 1984).

[2] The Masons acknowledged in their Reply Brief that Landes Cup "may still be able to amend its complaint

That said, the distinction is not relevant for determining whether prejudgment possession is appropriate.

Finally, "the current system of notice pleading requires only a short, plain statement of the claim showing that the pleader is entitled to relief and a demand for such relief." Songer v. Civitas Bank, 771 N.E.2d 61, 68 n.9 (Ind. 2002) (citing Ind. Trial Rule 8(A)). Here, the owner of the property requested the property to be sold. The Masons had notice that Landes Cup sought to eject them. For these reasons, the trial court did not err in awarding Landes Cup prejudgment possession.

II. Omission of Bond by Plaintiff

Also, the Masons argue that the trial court erred in not requiring Landes Cup to submit a bond. A court may not order prejudgment possession until the plaintiff submits a bond. Ind. Code § 32-30-3-6.

At the hearing, Michael Mason acknowledged that, in almost two years, they paid one dollar on the contract. As the contract required payment of $1702 per month, the amount due over those twenty-three months would have been at least $39,000.[3] Mason further testified that they made $60,000 in improvements to the property.[4] It appears that the trial court gave this testimony little weight and/or concluded that it was irrelevant. In its order, the trial court allowed the Masons to maintain possession only if they posted a bond. In calculating the

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to" seek forfeiture. Reply Brief at 3.

[3] Mason testified that the peak rental income over the twenty-three months was about $8000, meaning that rental income from contract execution to the date of the hearing may have been as much as $184,000.

[4] Mason also testified that they incurred legal fees in evicting a tenant. These fees, however, derived from the Masons' business of leasing commercial property, rather than from the instant contract.

amount of that bond, the trial court assigned no value to the alleged improvements.[5] Effectively, the trial court concluded that Landes Cup had no duty to post a bond because the Masons did nothing to honor the contract. As the judge asked, "Who's getting the windfall now? Who's getting the rent payments now?" Transcript at 60.

While the Masons are correct that the statute makes the bond mandatory, the law does not redress trifles. See D&M Healthcare, Inc. v. Kernan, 800 N.E.2d 898, 900 (Ind. 2003); and Brockmann Enter., LLC v. City of New Albany, 868 N.E.2d 1130, 1133-34 (Ind. Ct. App. 2007), trans. denied. Indeed, remand for the entry of a nominal bond would do little to further the proceedings. Any error therefore was harmless.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.

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[5] The trial court calculated the Masons' bond as (late rent plus taxes paid by Landes Cup).